PUBLIC FINANCE BHD

v.

HARTA PERTAMA SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: M-02-569-1996]
8 NOVEMBER 2002

EVIDENCE: *Witness - Recalling of - Undertaking to confine issues upon recall - Whether attempts to widen scope of inquiry properly disallowed*

In an action before the High Court commenced by the appellant against the respondents for the recovery of a loan, the main issue was whether a demand had been made against the guarantor respondents. At the close of the case, both counsel had agreed to allow the appellant to re-open its case and recall witness but limited towards the purpose of proving that a demand notice had in fact been sent to the guarantor respondents. However, counsel for appellant sought to widen the scope of inquiry when the witness was re-called. The trial judge disallowed this. The appellant appealed, arguing that the trial judge had erred by doing so. Counsel also contended that the trial judge ought to have entered judgment against the first respondent as borrower despite any infirmities that the appellant might have had against the guarantor respondents.

Held:
Per Gopal Sri Ram JCA

[1] Counsel for the appellant was bound by his undertaking to limit his question on recall and he had represented to the court to do so. Had the trial judge acceded to his application to widen the scope of inquiry, this would have occasioned a serious miscarriage of justice. (p 771 c)

[2] The trial judge had directed himself correctly on the law in that his refusal of the appellant's additional evidence was well within his province as the primary trier of facts. This court would not intervene with such findings of fact, especially where there were no exceptional circumstances to do so. (p 771 g)

[3] The second complaint had not been specifically addressed in the memorandum of appeal. As it had not been raised before the trial judge at the conclusion of the trial for him to peruse upon, any corresponding views expressed by this court would constitute a breach of the rules of natural justice. (p 772 a-b)

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Dalam satu pertikaian di Mahkamah Tinggi yang dimulakan oleh perayu terhadap pihak responden untuk mendapatkan semula pinjaman, isu utama adalah sama ada tuntutan telah dibuat terhadap penggerenti pihak responden. Pada bahagian akhir kes, kedua-dua peguam telah bersetuju untuk membenarkan perayu untuk membuka semula kesnya dan memanggil semula saksi tetapi terhad kepada tujuan membuktikan bahawa suatu notis tuntutan telah dihantar kepada penggerenti pihak responden. Walau bagaimanapun, peguam perayu telah cuba untuk meluaskan skop pertanyaannya setelah memanggil semula saksi. Hakim perbicaraan tidak membenarkannya berbuat begitu. Peguam perayu telah membuat rayuan sambil mengadu bahawa hakim perbicaraan telah tersilap dalam keputusannya. Peguam juga menghujjah bahawa hakim perbicaraan sepatutnya memberi keputusan terhadap responden pertama sebagai peminjam walaupun terdapat apa-apa kelemahan dalam kesnya terhadap penggerenti pihak responden.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Peguam perayu terbatas dengan janjinya untuk menghadkan pertanyaannya semasa pemanggilan semula dan telah membuat representasi kepada mahkamah untuk berbuat begitu. Jika hakim perbicaraan membenarkan permohonannya untuk meluaskan skop pertanyaannya, ia mungkin akan mengakibatkan salah laksana keadilan yang serius.

[2] Hakim perbicaraan telah mengarah dirinya dengan betul atas undang-undang dimana penolakkan tambahan kepada keterangan sememangnya dibawah kuasanya sebagai pembicara utama fakta-fakta. Mahkamah ini tidak akan campurtangan dalam dapatan fakta sebegitu, terutama sekali di mana tidak terdapat sebab-sebab luar biasa untuk berbuat begitu.

[3] Aduan kedua tidak secara khusus termaklum dalam memorandum rayuan. Oleh kerana ia tidak dibangkitkan dihadapan hakim perbicaraan pada akhir perbicaraan untuk dipertimbangkan olehnya, apa-apa pandangan yang sepadan yang dikeluarkan oleh mahkamah ini menjadikannya suatu perlanggaran rukun keadilan asasi.

Rayuan ditolak dengan kos.]

Case(s) referred to:
Muniandy Thamba Kaundan v. D & C Bank Bhd [1996] 2 CLJ 586 ***(refd)***

For the appellant - Tiu Long Kim; M/s Koh Kim Leng & Co
For the 1st, 2nd & 5th respondents - Manjit Singh; M/s Yau Jiok Hua & Co
For the 6th & 7th respondents - Jaspal Singh Gill; M/s Raghbir Singh, Norizan & Co

[Appeal from High Court, Melaka; Suit No: 22-13-1989]

Reported by M Maheswaran

JUDGMENT
(Oral)

Gopal Sri Ram JCA delivering judgment of the court:
This is the judgment of the court.

This is a fairly straightforward case. There is no issue of law involved here.

The appellant brought an action against the respondents to recover monies lent to the 1st respondent, which loan was guaranteed by the other respondents. At the trial, the issue was whether a demand had been made against the guarantor respondents. The appellant called evidence in support of its case. At the close of that case, the respondents submitted that there was no case to answer. However, at that stage there was an agreement reached between counsel that the appellant be permitted to re-open its case and recall PW1 for the limited purpose of proving that a notice of demand had in fact been sent out to the guarantor defendants. Counsel for the plaintiff/appellant in the court below gave an undertaking to the court that he would indeed limit his questions to a comparison of the notice of demand with its original. That was the only purpose for which the recall was agreed upon and permitted by the learned judge. However, after PW1 had taken the stand on the recall, counsel for the appellant sought to widen the area of inquiry. This was objected to and the learned judge, in our view, quite rightly refused to permit such a course to be pursued.

Before us, counsel for the appellant has sought to argue that the learned judge was wrong in refusing counsel in the court below for the appellant (not Mr. Tiu who appears before us today) to ask the additional questions. It is counsel's argument that the learned judge should have acted in the interests of justice and permitted the further inquiry. In our view, there is no merit in this complaint.

Counsel for the appellant in the court below, having given an undertaking, was bound by its solemn terms. He had represented to the court that he would limit his questions on the recall solely to the comparison of P2 with its original. If the judge had indeed acceded to the application to widen the inquiry, that would, in our view, have indeed caused a serious miscarriage of justice for it would have traversed the undertaking which led to the respondents' agreeing to the recall.

At the end of the whole case, the learned judge undertook a careful examination of the evidence. He came to the conclusion that the appellant had failed to prove service of the demand upon the guarantors. In arriving at his conclusion, he relied on the following passage from the judgment of the Federal Court in *Muniandy a/l Thamba Kaundan v. D & C Bank Bhd* [1996] 2 CLJ 586 at p. 595:

> It is obvious that 'sending' a notice is a far cry from 'serving' a notice and I had, during the arguments, pointed this out to counsel for the chargees, and he readily agreed with this proposition. Indeed, there was no proof of posting of this notice, and even if there had been, this even if accompanied by the fact that it was not returned, would not have sufficed as proof of service, in the absence of a deeming clause in the contract of loan or the annexure to the charge, bearing in mind especially the denial on oath by the chargors of receipt … .

In our judgment, the learned judge directed himself correctly on the law. So far as the facts are concerned, the learned judge's refusal to accept the evidence of the appellant's witnesses is a matter well within his province as the primary trier of facts. We have said often enough that we will not interfere with such findings of fact save in exceptional cases. This is not an exceptional case.

The other point raised before us by the appellant is that the learned judge ought to have entered judgment against the 1st respondent as borrower despite any infirmities that the appellant's case might have had against the guarantor respondents.

We invited Mr Manjit Singh of counsel for the 1st respondent to deal with that argument. He has pointed out to us that this complaint has not been addressed specifically in the Memorandum of Appeal. We agree. In those circumstances, we consider it inappropriate for us to express any views on the matter. This is particularly so when the point was not put to the learned judge at the conclusion of the case in the fashion it has been done before us. In our view, any attempt on our part to intervene at this point in the case would constitute a breach of the rules of natural justice, especially when the learned judge has not been given an opportunity to express his views on the matter.

For the reasons already given, this appeal fails. It is dismissed. The orders of the learned judge are affirmed.

Abdul Kadir Sulaiman JCA:

This appeal is dismissed with costs to the respondents. Deposit to the respondents towards account of taxed costs. The orders of learned judge are affirmed.